QUAPAW TRIBE OF OKLAHOMA

P.O. Box 765
Quapaw, OK 74363-0765

(918) 542-1[illegible]3
FAX (918) 542-4[illegible]4

November 14, 2006

Philip N. Hogen, Chairman
Chuck Choney, Commissioner
National Indian Gaming Commission
1441 L Street, NW, Suite 9100
Washington, DC 20005

Re: Proposed Definition Amendments and Game Classification Standards

Dear Chairman Hogen and Commissioner Choney:

The Quapaw Tribe of Oklahoma (O-Gah-Pah) hereby submits its comments on the National Indian Gaming Commission's (NIGC) Proposed Rules regarding the "Definition for Electronic or Electromechanical Facsimile" and "Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through an Electronic Medium Using 'Electronic, Computer or Other Technological Aids'" (Proposed Rule) as published in the Federal Register on May 25, 2006. Based on our analysis of the economic impact analyses, which only recently became available, we may have additional comments or points of clarification. If so, we will address such concerns during the comment period you have provided with regard to the economic impact analyses.

General Comments

As a general matter, we remain disappointed with the proposed regulation because the language fails to reflect the concerns we and other tribal governments addressed in earlier comments on the various drafts circulated by the NIGC. In particular, we are disappointed that the published version of the regulation is even more limiting and restricting than previous drafts notwithstanding that there was great unanimity among tribes opposing such limitations and restrictions on both legal and policy grounds. We strongly believe that the proposed rule contains unreasonable restrictions, limitations, and requirements on technological aids to Class II games that are not supported in case law.

We also oppose the proposed change to the definition of "electromechanical facsimile." We believe that the definition which has been in place since July 2002 is consistent with the case law and reflects a correct interpretation of the Indian Gaming Regulatory Act of 1988. In our view, the existing definitions provide a clear and proper distinction between Class II technological aids and Class III "electromechanical facsimiles." Moreover, we would again point out that IGRA specifically permits tribes to use Class II technological aids.

We understand and agree that the distinction is an important one given that regulatory framework

established in IGRA is based on three discrete classes of game. However, it is our opinion that the regulations incorrectly focus on superficial similarities between Class II aids and Class III electromechanical facsimiles rather than correctly focus on the characteristics of Class II games. We believe that the appropriate analytical framework under IGRA begins with an examination of the characteristics of the game rather than with the superficial characteristics of the equipment with which it is played. This is not to suggest that the equipment is analytically irrelevant, but rather to state that the first step is to determine whether the game to be classified comes within Class II gaming in the first instance. In other words, does the equipment support the play of one of the games the Congress has determined to fall within Class II gaming? If so, then the analysis proceeds to the next step: is it used to assist players to play a class II game or is the equipment used to facilitate play by broadening player participation in the Class II game? If so, it is an electronic aid provided that it does not constitute an electromechanical facsimile.

There is no question that Congress intended to authorize the use of electronic equipment in the play of Class II games because the very definition of bingo authorizes electronic draws. Moreover, IGRA specifically uses the term "electronic" in relation to aids. Additionally, the legislative history accompanying IGRA clearly states that tribes are to be able to use modern methods of conducting Class II gaming, to wit: electronic equipment, such as computers, etc.

Prior to 2002, the NIGC regulatory definitions reflected a clear misapprehension within the agency as to the importance of the game as juxtaposed against the medium through which it is played. An "electronic aid" and an "electromechanical facsimile" are two very distinct things with one thing in common: both may utilize electronics. Instead of providing proper distinctions, however, the agency confused these two very distinct types of equipment by focusing instead on the one common factor: both may utilize electronics. It then compounded the confusion by mistaking superficial characteristics common to each, such as auditory noises and graphic imagery with the distinct functions performed by the two types of equipment. The federal courts were instrumental in disentangling superficial characteristics from function and providing proper interpretational guidance. The proposed regulation, however, reflects continuing confusion within the agency as to the crucial distinctions between aids and facsimiles. Promulgation of the regulation as proposed will serve only to codify a fundamental misapprehension as to the correct distinction between aids and facsimiles, advancing neither legal clarity nor stability and precluding tribes from enjoying the full benefit of the law as enacted by the Congress.

We believe that the distinction between electronic aids and electromechanical facsimiles is considerably more straightforward that that which is reflected in the proposed rule. The key element is function. An electronic aid is a tool providing multiple players the means to compete against one another in the play of a class II game. In contrast, an "electromechanical facsimile" is a type of gambling device akin to a "slot machine" in which a single individual operates the equipment or device on a stand alone basis on the chance that the equipment or device will generate a winning combination entitling the player to a prize or monetary award. In this sense, the operation of a gambling device is analogous to a player competing against the house in that either the player wins by securing a winning combination, in which case, the house does not keep the player's wager or the player loses by not securing a winning combination, in which case the house takes the player's wager. An electromechanical facsimile operates on precisely the same basis as a slot machine, regardless of the imagery displayed on the equipment or device. In other

words, it doesn't matter if the machine displays reels, cards, or other imagery; what is important is that the machine randomly generates combinations of such images, some of which are winning and some of which are not, based on a programmed retention ratio.

An electronic aid to a Class II game, on the other hand, broadens competition between players in a common game or games played for prizes. Although the house may keep some of the players' wagers as a fee, it is not a player in the same sense as it is when a patron operates a slot machine or a facsimile because one of the players among the group of players will "win" the prize or prizes for which they wager and for which they compete. The use of a "technological aid, therefore, is simply a modern method for players to play those games that IGRA designates as Class II games and compete among one another for prizes. Bingo, for example, is the same game whether it is played in live session on paper cards with ink daubers or through the use of an electronic player terminal. As one witness pointed out during the September 27, 2006 hearing, "the game of "bingo" transcends the medium: it doesn't matter if the card is carved on a rock or displayed on a video screen – bingo is bingo." We wholly agree with this statement and conclude that so long as bingo meets the statutory definition in IGRA and is played between players, it is bingo regardless of the medium through which players play it.

Does this mean that mean that the use of "bingo" imagery on an electronic machine would transform such machine into an electronic aid to a Class II game? Absolutely not: again, the imagery is irrelevant to the classification of the game. No matter what imagery is displayed such a machine it will remain Class III gambling if the machine is operated on a stand-alone basis, and randomly generates combinations based on a pre-programmed retention ratio some of which may entitle the individual operating the machine to valuable consideration.

Again, an electronic aid is simply a vehicle through with multiple players may play Class II games and compete against one another in a common game for a prize or prizes. This should not be interpreted as requiring all players in a common game to compete for precisely the same prize, however. Even in live-session bingo played with paper cards and ink daubers, prize levels may vary for differing patterns or based on varying amounts wagered. It is common in bingo play to award a prize for a "postage stamp" pattern, for example, and then continue the draw allowing for other winning patterns until a player is able to "black out" his or her entire card. It is also common for players in live-session bingo to pay higher amounts (make higher wagers) in order to compete for higher prize levels. Regulations restricting the manner in which bingo may be played beyond the statutory parameters simply fail to reflect the manner in which bingo is commonly played contrary to what Congress intended when it enacted IGRA.

Furthermore, we view the proposed regulation as unfairly and improperly restricting the play of games similar to bingo, particularly the prohibition on bonanza style bingo. Bonanza bingo is simply one of many variants of the game of bingo commonly played in bingo halls throughout the world. Variation enhances enjoyment of the game and numerous variants on the game of bingo have been introduced over time now extremely common worldwide. Bonanza bingo is one such example. In bonanza bingo some but not all of the numbers are drawn before play commences. Some cards will contain some of the pre-drawn numbers while other won't. Players possessing cards with numbers that match the pre-drawn numbers may have a statistical advantage of winning, but players holding cards bearing none of the pre-drawn numbers may

nonetheless win depending on the outcome of the draw. Another variant is "U-Pick-Em" bingo, in which players are able to select some or all of the numbers (or other images) contained on their bingo card. Another variant is where a player may designate a certain number of additional "free spaces" on their card. In some variants, there is no free space at all on the card. Regardless of the rules, these types of variants are precisely what the Congress had in mind when it included "games similar to bingo" as coming within Class II gaming. Restrictions prohibiting tribes from offering such variants are not only unreasonable and arbitrary and capricious, but not in accordance with the statute or a permissible interpretation of the statute. Accordingly, we oppose those provisions in the proposed regulation which restrict the definition of "games similar to bingo," particularly "bonanza bingo."

The restrictions on "sleeping" are objectionable on the same grounds. Rules pertaining to "sleeping" vary dramatically in bingo games. Some are very strict; others are very loose depending on rules established for particular games. Such rules, however, are not determinative of whether a game of bingo constitutes bingo: they are simply rules governing the play of the game. The proposed rule elevates sleeping rules to an element of bingo. We are unable to discern any provision of IGRA as authorizing the NIGC to include additional elements in the definition of bingo. In fact, we believe that doing so would constitute an unlawful interpretation of bingo because it is inconsistent with the statutory definition of bingo clearly and specifically set out in IGRA. We would add that bingo is a game and the NIGC may not get around the statutory definition of bingo by means of defining a "game of bingo" as something different from the definition of bingo as set forth in the statute. It is black letter law that an agency may not alter statutory law through the rulemaking process no matter how unsound the agency may view the law. Agencies may fill gaps left by the Congress to the agency, but the Separation of Powers Doctrine does not allow an agency to substitute its judgment for that of the Congress.

There are sound policy considerations supporting our views opposing the proposed regulation and revised definitions. Technological aids by their very nature permit greater player participation both within and between tribal gaming facilities, which is consistent with the policies advanced by IGRA. Furthermore, technological aids are more easily regulated and actually enhance accountability. Computer technology associated with electronic aids can precisely record amounts wagered, paid-out, and prizes awarded, making it easier to account for revenues. Electronically aided Class II games produce higher revenues than live session bingo played on paper cards. In turn, increased gaming revenue advances the policy objectives intended by Congress in enacting IGRA because they provide tribal governments the means to strengthen their institutional capacity, not only in relation to the regulation of gaming, but generally; strengthen their economies; increase the delivery of services; build infrastructure; and to enhance the quality of life for tribal members and tribal communities.

We urge the NIGC to reconsider withdrawing this proposed rule and return to the consultation table in order that we may work together to frame a regulation that reflects the interests of both the NIGC and tribal governments. We stand ready to work with the NIGC to resolve the issues and concerns which gave rise to this rulemaking on a constructive and cooperative basis. We do not question the NIGC's good-faith, but we believe that a much better, less economically harmful alternative can be achieved. We believe that IGRA was designed to foster close cooperation and coordination between tribal governments and the NIGC in a system in which

both are assigned specific regulatory roles. The very structure of the NIGC and the requirements related to the composition of the Commission were designed to ensure that the ultimate decision makers have both the authority and the latitude to act in the best interest of tribal governments by ensuring that tribes enjoy the fullest benefit of the law as enacted by the Congress as a means of preserving and advancing tribal sovereignty.

We fully agree that the present informal process for the classification of games is unsatisfactory. We further acknowledge the NIGC's interest in ensuring that games are subject to proper classification based on well-defined procedural standards as well as legal standards consistent with case law. We are equally supportive of the concept of utilizing game testing laboratories to ensure that gaming equipment, both technological aids to Class II games and Class III gambling devices, are safe and secure from tampering and cheating. Moreover, we recognize that testing provides a means for verifying the representations of gaming vendors and manufacturers as to the architecture of gaming platforms. In these respects, we believe that the interests of the NIGC and the tribes are clearly aligned. Though we may have different views about both substance and procedure, we believe that it is possible to come together in good faith to produce a mutually acceptable solution.

Specific Comments

1. Withdraw the proposed change in the definition of "electromechanical facsimile."

We strongly oppose the proposed definition of "electromechanical facsimile" and urge its withdrawal. We view the NIGC's 2002 revised definitions as a correct statement of the law and consistent with the decisions of the federal courts in a series of game classification cases. Contrary to the views we have heard expressed by NIGC personnel, the 2002 definition of "electromechanical facsimile" provides a proper distinction between an "electronic aid" and an "electromechanical facsimile." While the definition authorizes the game of bingo and games similar to bingo to be played in a wholly electronic format, it makes clear that only such games that link players and which constitute a competition between players are properly characterized as an electronic aid. Gaming equipment which allows a single player to operate it on a stand-alone basis where there is no competition with another player regardless of the graphic imagery or mechanics used, on the other hand, constitutes a gambling device requiring a compact before it may be offered under IGRA.

Under the 2002 definition, even a game wholly *replicating* bingo, for example, would nonetheless constitute Class III gaming if it does not "broaden participation" beyond a single player. The imagery is meaningless to the distinction between classes of games. The distinction goes to whether a game is being played between players or whether a gambling device is being operated by a single individual. We view the 2002 definitions as reasonable interpretations of IGRA consonant with the decisions of the federal courts.

In stating that "tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development," Congress made clear its intent that Class II game technology is not to be restricted. Committee Report, 1988 U.S.C.C.A.N. at 3079. The courts have relied on this language to address the distinction between Class II technological aids and Class III

electromechanical facsimiles. As a direct result, tribal governments have relied on these rulings to make decisions related to and substantial investments in class II technology as well as in establishing and expanding gaming operations. The NIGC is well aware of these facts and the importance of class II gaming to tribal governments from an economic, social, and institutional perspective. The promulgation of a regulation placing strict new requirements and limitations on class II gaming is both unreasonable and fundamentally unfair. We, therefore, oppose the proposed change in the definitions.

2. While there is merit in a policy directed to ensuring that gaming patrons understand the nature of the games offered for play, this can be readily accomplished in considerable less onerous ways than proposed.

We believe that it is in the interest of all to ensure that players understand the nature of the games offered for play. Reliable information about the nature of the games and the rules governing play enhances patron confidence. Our electronically aided bingo games contain clearly visible bingo cards right on the video display screen, which also displays the numbers in the order drawn. The card lights up when a corresponding number is drawn and daubed. Based on our extensive experience with electronically aided class II games, we believe that our patrons are well aware that the bingo display is the critical element to the outcome of the game. Nonetheless, the rules of the game are at all times available to even the most inexperienced novice. We believe that these factors achieve the desired objective in this regard and recommend that the provisions requiring a split screen and two inch letters proclaiming the class of the games be omitted.

4. The additional restrictions on electronic aids to Class II games should be deleted from the regulation.

We respectfully object to the imposition of greater restrictions on Class II gaming. We strongly believe that the law has evolved to provide clear and appropriate legal standards and the 2002 changes in the NIGC's regulatory definitions based on federal case law have served to provide an even brighter line. In our view, the proposed rule would not only overturn ten years of case law, it will likely produce even more litigation. *See United States v. 162 Megamania Gambling Devices*, 231 F.3d 713, 715 (10th Cir. 2000) ("Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a [C]lass II game, and is played with the use of an electronic aid."); *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1102 (9th Cir. 2000) (rejecting the notion that the Johnson Act extends to technologic aids to the play of bingo); *Diamond Game Enterprises v. Reno*, 230 F.3d 365, 367 (D.C. Cir. 2000) (noting that Class II aids permitted by IGRA do not run afoul of the Johnson Act); *United States v. Burns*, 725 F.Supp. 116, 124 (N.D.N.Y. 1989) (indicating that IGRA makes the Johnson Act inapplicable to Class II gaming and therefore tribes may use "gambling devices" in the context of bingo). Rather than brighten the line, promulgation of the rule will muddy the waters indefinitely thwarting realization of the objectives the NIGC asserts underlie the proposed rule.

One thing clear from the decisions in the game classification cases is that the three elements of bingo set forth in IGRA "constitute the sole *legal* requirements for a game to count as Class II bingo." *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1102 (9th Cir. 2000).

The proposed rule, however, reflects a bold maneuver around both IGRA and the decisions of the federal courts by defining not "bingo," but a "game of bingo," then adding a long and arbitrary list of requirements and limitations evidently designed to undercut the economic viability of electronically aided bingo. In reality, however, bingo is a game, and one specifically enumerated by the Congress as one of several class II games. Hence, the proposed rule would not only reverse federal case law, but would re-write the law as enacted by the Congress.

No matter how ill-advised a federal agency may view a particular statute and regardless of its good intentions, federal agencies lack authority to alter statutory law through the rulemaking process as a matter of Constitutional law. The courts accord federal agencies considerable latitude in interpreting, administering, and enforcing statutory law, but only where its actions and/or decisions are in accordance with the law and within the scope of its authority. In so determining, federal courts apply a standard of reasonableness in determining whether the agency's actions or decisions offend the "arbitrary and capricious" test. *Overton Park v. Volpe*, 401 U.S. 402 (1971). Although a court does not substitute its judgment for that of the agency, where the Congress has "directly" spoken to the "precise" question and the statute is neither silent nor ambiguous with respect to the specific issue, then the court is to give effect to the unambiguous expressed intent of the Congress. See, *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

We object to the following restrictions because Congress has already "directly" and "precisely" to the definition of the game of bingo, leaving the NIGC without any "gaps to fill" because the statute is neither silent nor ambiguous with respect to the meaning of bingo. Specifically, the Nation objects to the following aspects of the proposed regulation:

a. *Pre-Drawn Balls*. As previously discussed, we believe that the prohibition on use of "pre-drawn balls" eliminate games that pre-date IGRA, and run counter to Congressional intent and case law directing that no additional requirements be placed on a game of bingo. We believe that "bonanza bingo" should be deemed to constitute a permissible variant of bingo.

b. *Timing of Card Selection*. The proposal's restriction on players obtaining a new card once game play begins or joining a game in progress also brings new and unwarranted limits to bingo and games similar to bingo that pre-date bingo—restraints not intended by Congress and rejected by the courts.

c. *Numbers Comprising the Ball Draw*. The proposal's mandate on the number of the bingo ball draw at "exactly 75 numbers", while maintaining a distinct definition for games similar to bingo is also not founded in the law.

d. *Game Delays*. The Proposed Rule's series of delays to bingo daubs, ball releases, and player entry into games have no basis in the legal definition of bingo and are unfounded in IGRA.

e. *Sleeping Provisions*. In direct conflict with the law and the game of bingo, the proposal prohibits bingo players from catching-up on slept numbers that

contribute to interim, progressive, and/or consolation prizes and prohibits slept numbers that contribute to a game-winning pattern from being "caught-up"—unless that player is the first to cover all other numbers comprising that pattern.

f. *Auto-Daub Prohibition*. We oppose the prohibition on auto-daub features and note that bingo minders with auto-daub features were in common use prior to enactment of IGRA as technological aids to bingo play.

g. *Prohibition on Diverse Interim Patterns*. We object to this prohibition. We believe that there is no just reason for prohibiting players who are competing for the same *game-winning* pattern from competing for different *interim* patterns.

h. *Bingo Card Specifications*. While IGRA requires that bingo be played with cards, we do not believe that additional restrictions on size, number of squares, and the range of numbers that may appear on the card should be contained in the regulation. We do not object to the "readily visible" standard provided that it is reasonable.

i. *Three Number Requirement*. The proposal's requirement that at least three (3) numbers or designations—not counting free spaces—must be covered to constitute a winning pattern should be deleted. We do not oppose a definition of the term "pattern" requiring that a pattern consist of at least two covered spaces.

j. *Prize Limitations*. The proposed restrictions on the amount and types of prizes should be deleted.

k. *"Uniformity" Participation Broadening Standards*. We believe that it would be an error to require all technological aids to "broaden participation." An electronic bingo blower is doubtlessly an aid, but it does not "broaden participation." Whether an electronic aid broadens participation is certainly a relevant factor, but it should not be considered determinative in a classification determination.

l. *Johnson Act Evaluation* The NIGC should remove all language implying that the Johnson Act coverage should be a dispositive factor in the classification of a game.

m. *Games Similar to Bingo*. Because Congress intended that the term "games similar to bingo" allow for "maximum flexibility" in the innovation of new bingo-like games, we disagree with the proposed limitations on what games may be considered "an other game similar to bingo."

n. *Electronic Pull-Tabs*. The proposal's requirement of a tangible medium for pull-tabs is outdated. We believe electronic aids to the play of pull tabs could include more types of equipment that simple dispensers and reader without running afoul of the prohibition on electromechanical facsimiles provided that proper legal standards are enacted. For example, we believe that a player terminal housing a

cartridge or other storage medium containing a pre-determined deck or deal of pull tabs would not run afoul of the facsimile prohibition so long as: 1) the deck or deal may not be shuffled or otherwise randomized; 2) each pull tab must be drawn in the order dealt; and 3) the entire deck or deal may not be withdrawn or replaced until all pull tabs have been played. Nor would we oppose an additional requirement of a paper receipt for each winning tab, though we do not believe that it would be absolutely essential so long as the recommended standards are adopted. We do agree that a machine that randomly generates an electronic pull tabs based on a pre-programmed retention ratio would constitute a facsimile, but we do not believe that an externally created deck or deal inserted into an electronic aid and dispensed in order of the draw should be deemed anything other than the play of the game of pull tabs. Finally, we object to the prohibition on the dispensation of prizes from a pull tab reader or dispenser.

o. *Lotto*. The proposal's definition of lotto wrongly equates lotto with bingo, which, by listing it along with bingo, Congress clearly deemed as distinct from bingo.

4. If enacted, the proposed rule would eliminate every Class II aid available in the marketplace today, resulting in tremendous economic hardships.

Despite the thoughtful comments of numerous tribes on previous drafts of the rule, many of the most troubling provisions remain in the published proposal. The Proposed Rule would effect a reclassification of *all* games that the federal courts, tribal gaming commissions, and the NIGC itself have previously determined to be Class II. Consequently, all existing Class II games will become Class III and require a Tribal-State Compact for their operation. We believe that such provisions are unfair and unreasonable and should be removed.

5. The deadline for compliance is unreasonable.

We are concerned about the Proposed Rule's six (6) month deadline for compliance. Not only will all existing games in use become Class III games upon finalization of the proposed rule, manufacturers have indicated that they will likely not be able to develop and manufacture a market-worthy variety of compliant games by the deadline. The implementation of the NIGC's certification program (and the anticipated flood of initial submissions) will certainly lengthen the time between the deadline and making compliant games available to the public. Tribes will not be allowed to offer Class II aids during this time period, effectively stripping them of their rights under IGRA.

6. The proposed rulemaking alters statutory law.

The proposed rule alters the game of bingo to such a degree that the resulting game is not bingo at all. In fact, the proposed regulation effects an amendment to the definition of bingo as contained in IGRA. The restrictions, limitations, and requirements contained in the proposed rule go far beyond a simple interpretation of the law rather they change the law.

7. The rule undermines the economic viability of Class II gaming.

According to industry projections the rule would produce losses in excess of **$1 BILLION** of direct revenue a year if the proposed rule becomes final. With approximately 50,000 Class II games in use today generating over $2 billion of revenue annually, a prime source of funding for tribal programs will be destroyed. These figures do not account for the thousands of lost jobs and wages, investment losses, transition costs, costs of legal and professional services (which are already significant), retooling and redesigning of games to meet compliance, reduced spending in local economies, and other direct and indirect negative economic impacts and unfunded mandates sure to come from this rulemaking. All of these losses and costs–especially associated with a rulemaking that is completely unsupported by law–are unacceptable.

8. The proposed rule offends basic notions of fundamental fairness and due process of law.

The Proposed Rule fails to resolve the basic problems associated with the NIGC's existing game Classification process and omits any meaningful role for tribal regulators—the primary regulators of Indian gaming under IGRA—in game classification. The proposal creates an ongoing relationship between the NIGC and gaming laboratories exclusive of tribes. No statutory authority exists for the NIGC to usurp Indian government authority and become the sole selector of gaming laboratories qualified on technical matters—nor the legal matter of the classification of games. Perhaps more importantly, the proposal lacks an appropriate mechanism for a tribe or its regulatory agency to challenge the classification of a game on a government-to-government basis. Such procedures are essential to ensure basic due process in a process that has a significant and lasting impact upon tribal governments. We object to the absence due process in the proposal and request that the NIGC include such procedures.

Sincerely,

John Ber
Chairman

cc: Members of the Senate Committee on Indian Affairs
Members of the House Resources Committee
National Indian Gaming Association

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FAX NUMBER (202) 632-7066 SUBJECT Comments

FROM (Quapaw) Tribe of Oklahoma

TELEPHONE NUMBER (202) 955-8601

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Alt fax #: (202) 955-8605

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PARIS LAS VEGAS
3655 Las Vegas Boulevard South
Las Vegas, Nevada 89109
Facsimile 702.946.4405

BALLY'S LAS VEGAS
3645 Las Vegas Boulevard South
Las Vegas, Nevada 89109
Facsimile 702.967.4405